

Amendments to Senate Bill No. 121
1st Reading Copy

Requested by _____

For the Senate Taxation Committee

Prepared by Brenda Gilmer
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1. Page 1, line 12.

Strike: "and may not"

Insert: ", receive any consideration for, or"

Purpose of amendment: The amendment expands the prohibited conduct by tax return preparers beyond "sale" to preclude disclosing tax return information for any consideration, which would prevent preparers from receiving kickbacks when they have loan, contract, or other intertwined financial relationships.

2. Page 1, line 16.

Strike: line 16 in its entirety

Insert: "the state unless:

(a) the taxpayer has requested the disclosure;

(b) the tax return preparer located outside of the state agrees:

(i) not to sell or receive any consideration for the tax return information; and

(ii) not to otherwise disclose the tax return information for its benefit or for the benefit any person controlling, controlled by, or under common control with it; and

(c) the local tax return preparer indemnifies the taxpayer for the damages provided for in subsection (3)(d) for any sale or disclosure by the tax return preparer located outside the state in violation of subsection(2)(b)."

Purpose of amendment: The amendment expands a Montana taxpayer's recourse against return preparers located outside the state (which covers all relevant entities outside Montana and outside the United States) by prohibiting local preparers from sending the tax return information to a foreign preparer unless the foreign preparer agrees not to disclose the information and the preparer with whom the taxpayer is dealing agrees to indemnify the Montana taxpayer for prohibited disclosures by the foreign preparer. Montana law defines indemnity in §28-11-301:

Indemnity defined. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.

The two parties over whom the state has power are the local return preparer and the taxpayer, and it is to those two parties that the provision for indemnification is directed. It is common practice to require a principal to indemnify another party to a contract for the actions of the principal's employees and agents. The following is the indemnification provision included in most state contracts:

The Contractor is liable for financial loss to the State that occurs due to the negligence, acts, omissions, or failure by the Contractor, its agents, employees, representatives, assigns, or subcontractors to comply with the terms of this Contract. The Contractor shall protect, defend, and save the State of Montana, its elected and appointed officials, agents, and employees, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, for any loss or injury arising out of services performed or acts or omissions of the Contractor, its agents, employees, representatives, assigns, or subcontractors under this Contract.

Montana agency law also currently imposes that duty.

28-10-602. Principal's responsibility for agent's negligence, omissions, and wrongs. (1) Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

(2) A principal is responsible for no other wrongs committed by his agent than those mentioned in subsection (1) unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

By requiring the local preparer to indemnify the taxpayer for the wrongful acts of the local preparer's foreign "agent," the local taxpayer has a direct action against an in-state preparer that can be pursued in state court for damages the taxpayer suffers as a consequence of the foreign agent's wrongful disclosures. With respect to the relationship between the local

preparer, over whom the state has jurisdiction, and the foreign company, over which the state does not have direct jurisdiction, they are free to determine, by agreement, if the foreign company will indemnify the local preparer for wrongful disclosures and to devise a means within their power to enforce that indemnification.

3. Page 1, line 18.

Following: "(1)"

Insert: "or (2)"

4. Page 1, line 21.

Following: "(1)"

Insert: "or (2)"

The amendments in paragraphs 3 and 4 are technical amendments that clarify that disclosures in violation of either subsection (1) or subsection (2) are actionable.

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